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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/844,564	04/27/2001	Ming Yu Chang	01-03-1627	1790

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EXAMINER

YEUNG, JAMES C

ART UNIT	PAPER NUMBER
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3743

DATE MAILED: 12/17/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.
09/844,564

Applicant(s)
Chang

Examiner
James C. Yeung

Art Unit
3743



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE three MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on Sep 9, 2002
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-15 is/are pending in the application.
- 4a) Of the above, claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-15 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claims _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are objected to by the Examiner.
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
- a) ☐ All b) ☐ Some* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- *See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

Attachment(s)

- 15) ☐ Notice of References Cited (PTO-892) 18) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 16) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 19) ☐ Notice of Informal Patent Application (PTO-152)
- 17) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____ 20) ☐ Other:

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DETAILED ACTION

Reissue oath or declaration

1. **37 CFR 1.175(a)(1)**

(a) The reissue oath or declaration in addition to complying with the requirement of 1.63, must (emphasis added) also state that:

(1) The applicant believes the original patent to be wholly or partly inoperative or invalid by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than the patentee had the right to claim in the patent, stating at least one error being relied upon as the basis for the reissue. (emphasis added).

2. The reissue oath/declaration filed with this application is defective because it fails to identify at least one error which is relied upon to support the reissue application. See 37 CFR 1.175(a)(1) as noted above and MPEP § 1414. The reissue declaration must identify a single word, phrase or expression in the specification or in an original claim, and how it renders the original patent wholly or partly inoperative or invalid.

On page 11 of the applicant's remark, the arguments directed to the fact that "An attorney failed to appreciate the full scope of the invention of the invention qualifies as an error under section 251 and is correctable by reissue" has been noted. However, the reissue oath/declaration

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fails to identify at least one error being relied upon as the basis for the reissue. See 37 CFR 1.175 (a)(1) as noted above.

3. Claims 1-15 are rejected as being based upon a defective reissue declaration under 35 U.S.C. 251 as set forth above. See 37 CFR 1.175.

The nature of the defect(s) in the declaration is set forth in the discussion above in this Office action.

4. Claims 1-15 are rejected under 35 U.S.C. 251 as being an improper recapture of broadened claimed subject matter surrendered in the application for the patent upon which the present reissue is based. See *Hester Industries, Inc. v. Stein, Inc.*, 142 F.3d 1472, 46 USPQ2d 1641 (Fed. Cir. 1998); *In re Clement*, 131 F.3d 1464, 45 USPQ2d 1161 (Fed. Cir. 1997); *Ball Corp. v. United States*, 729 F.2d 1429, 1436, 221 USPQ 289, 295 (Fed. Cir. 1984). A broadening aspect is present in the reissue which was not present in the application for patent. The record of the application for the patent shows that the broadening aspect (in the reissue) relates to subject matter that applicant previously surrendered during the prosecution of the application. Accordingly, the narrow scope of the claims in the patent was not an error within the meaning of 35 U.S.C. 251, and the broader scope surrendered in the application for the patent cannot be recaptured by the filing of the present reissue application.

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The following are the subject matter that applicant previously surrendered during the prosecution of the application:

In claim 1, the following omitted/broadened claim limitations: “integrally formed” (line 34); “glossy” (line 36); and “a width equal” (line 37) are considered to be subject matter that applicant previously surrendered during the prosecution of the application. Accordingly, the narrow scope of the claims in the patent was not an error within the meaning of 35 U.S.C. 251, and the broader scope surrendered in the application for the patent cannot be recaptured by the filling of the present reissue application.

In claim 10, the following omitted/broadened claim limitation “glossy” (line 34) is related to subject matter that applicant previously surrendered during the prosecution of the application. Accordingly, the narrow scope of the claims in the patent was not an error within the meaning of 35 U.S.C. 251, and the broader scope surrendered in the application for the patent cannot be recaptured by the filling of the present reissue application.

In claim 13, the following omitted/broadened claim limitations: “integrally formed”; “glossy”; and “a width equal” (note original claim 3 of S.N. 08/881,848) are related to subject matter that applicant previously surrendered during the prosecution of the application. Accordingly, the narrow scope of the claims in the patent was not an error within the meaning of

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35 U.S.C. 251, and the broader scope surrendered in the application for the patent cannot be recaptured by the filing of the present reissue application.

Response to Arguments

5. Applicant's arguments filed Sep 9, 2002, Paper No. 10 have been fully considered but they are not persuasive.

Contrary to applicant's assertion on pages 15-16 of the remarks, the recapture rule (see below) does apply to a situation where applicant amended the objected to claims to put them in condition for allowance without making any substantive arguments and/or comments. That act alone clearly constitutes the surrendering of the subject matter for purposes of applying the recapture rule. Clearly, it is not permissible to amend claim 1 and 10 of the '307 Patent in a broadening reissue application because applicant surrendered the subject matter during the original prosecution.

Recapture Rule

6. The recapture rule "prevent a patentee from regaining through reissue the subject matter that he surrendered in an effort to obtain allowance of the original claims." Clement, 131 F3d at 1468, 45 USPQ2d at 1164. Reissue claims that are broader than the original patent's claim in a manner directly pertinent to the subject matter surrendered during prosecution are impermissible. Id. (Quoting Mentor, 998 F.2d at 996, 27 USPQ2d at 1525).

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7. In view of the above application of the recapture rule, it is clear that when Applicant combined the subject matter of objected to claims to put them in condition for allowance, the applicant surrendered, in an effort to obtain allowance, the original claims whether or not any statement limiting subject matter or arguments by applicant surrendering subject matter had been presented. In this regard, see also Pannu v. Storz Instruments Inc., 59 USPQ2d 1597 (Fed. Cir. 2001).

8. The arguments on pages 18-20 of the remarks directed to the prosecution history of the patent '037 has been noted. However, the arguments are considered to be irrelevant to whether the recapture rule applies because the prosecution history of patent '037 and the acts and understandings of the previous attorney are not at issue in this reissue application.

9. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

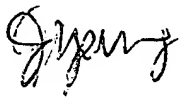
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR

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1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to James C. Yeung whose telephone number is (703) 308-1047. The facsimile phone number for this Art Unit is (703) 308-7764.

JY
November 26, 2002


James C. Yeung
Primary Examiner

FULL TEXT OF CASES (USPQ2D)

All Other Cases

Pannu v. Storz Instruments Inc., 59 USPQ2d 1597 (CA FC 2001)

Pannu v. Storz Instruments Inc., 59 USPQ2d 1597 (CA FC 2001)

59 USPO2D 1597

Pannu v. Storz Instruments Inc.

U.S. Court of Appeals Federal Circuit

No. 00-1482
Decided July 25, 2001

Headnotes

PATENTS

[1] Practice and procedure in Patent and Trademark Office — Reissue — Broader claims sought (§110.1313)

Patentability/Validity — Construction of claims (§115.03)

Patent construction — Prosecution history estoppel (§125.09)

Plaintiff's reissue claim for intraocular lens is invalid on ground of improper recapture of subject matter surrendered during prosecution to avoid prior art rejections, since reissue claim eliminated limitation on shape of "haptics" element of lens, and thus is broader than corresponding claim of original patent, since this broadened aspect of claim relates to surrendered subject matter, in that shape of haptics was same subject matter that was surrendered during prosecution of original application, and since recapture was not avoided by addition, on reissue, of limitations on haptics' dimensions and positioning, which do not narrow claim in manner directly pertinent to specific aspect that was narrowed during prosecution, namely, shape of haptics.

Particular Patents

Particular patents — General and mechanical — Intraocular lens

Re. 35,525 (of 4,435,855), Pannu, universal intraocular lens and a method of measuring an eye chamber size, summary judgment of invalidity affirmed.

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Case History and Disposition

Appeal from the U.S. District Court for the Southern District of Florida, Dimitrouleas, J.

Action by Jaswant S. Pannu and Jaswant S. Pannu M.D., P.A. against Storz Instruments Inc. for patent infringement, in which defendant counterclaimed seeking declaratory judgment of invalidity. District court granted defendant's motion for summary judgment of invalidity, and plaintiff appealed. Affirmed.

Related decision: 47 USPQ2d 1657.

Attorneys:

Michael C. Cesarano, of Senterfitt & Eidson, Miami, Fla., for plaintiffs-appellants.

Edward W. Remus and Jonathan R. Sick, of McAndrews, Held & Malloy, Chicago, Ill.; Craig E. Larson, of Bausch & Lomb Inc., Rochester, N.Y.; Rita D. Vacca, of Bausch & Lomb Surgical Inc., St. Louis, Mo., for defendant-appellee.

Judge:

Before Mayer, chief judge, Friedman, senior circuit judge, and Rader, circuit judge.

Opinion Text

Opinion By:

Mayer, C.J.

Jaswant S. Pannu and Jaswant S. Pannu, M.D., P.A. (collectively Pannu) appeal the judgment of the United States District Court for the Southern District of Florida, *Pannu v. Storz Instruments, Inc.*, 106 F. Supp. 2d 1304 (S.D. Fla. 2000), granting summary judgment for Storz Instruments, Inc. (Storz) that U.S. Patent No. Re 32,525 is invalid under 35 U.S.C. §251, the recapture rule. Because the reissued patent improperly broadened claims in a manner directly pertinent to subject matter surrendered during prosecution, we affirm.

Background

In 1980, Pannu filed a patent application for an artificial intraocular lens, S/N 136,243 (243 application). An intraocular lens is an artificial plastic lens that may be implanted in an eye to replace a natural lens. The 243 application disclosed a round lens called an "optic" that focuses light on the retina, and two or more elements called "haptics" that are attached to the optic and contact internal tissue in the eye for the purpose of positioning and securing the optic. The haptics in Pannu's application included "snag resistant" discs at the end. In 1981, Pannu filed a continuation-in-part application, S/N 261,953 (953 application), based on the original 243 application. The 953 application added new matter, claiming a lens in which the haptics are "integrally molded" to the lens body, and the lens could be placed in either the anterior or posterior chamber of the eye.

Independent claim 1 of the '953 application reads as follows:

A posterior chamber intraocular lens comprising:

a lens having a width and a thickness;

a retention loop including a flexible strand having a width and a thickness and such strand is joined at one end to the lens and has an opposite free end;

and a snag resistant disc joined to the flexible strand's free end;

said snag resistant disc having a width which is at least 3 times greater than the thickness of the disc, at least 3 times greater than the width of the flexible strand, and at least 1/5 as great as the width of the lens for smoothly guiding the free end of the flexible strand across an inner edge of an iris when moving said strand into and out of a posterior chamber of an eye;

said snag resistant disc lying in a plane sufficiently close to a plane of the lens so that both the disc and lens can fit into a posterior chamber behind an eye's iris.

The examiner rejected claims 1-14 as obvious under 35 U.S.C. §103 in light of four prior art references: U.S. Patent No. 4,159,546 (Shearing patent), a publication showing the "Lindstrom Centrex" lens, U.S. Patent No. 4,249,271 (Poler patent), and U.S. Patent No. 4,092,743 (Kelman patent). In response, Pannu filed a supplemental amendment that cancelled claims 1-7 and 10-14, added new claims 16-22, and modified claims 8 and 9 to be dependent upon claim 16. Independent claim 16 reads as follows:

An intraocular lens comprising:

a lens body;

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at least two flexible positioning and supporting elements integrally formed with said lens body and extending from the periphery of said lens body;

said elements defining a continuous, substantially circular arc having a diameter greater than the diameter of said lens body, said arc curved toward said lens circumference; and

snag resistant means integrally formed on the free end of said elements for smoothly guiding the lens across eye tissue when implanting the lens.

Pannu raised six arguments for the patentability of claim 16 over the four prior art references, including the distinction of "a continuous substantially circular arc having a diameter greater than the diameter of the lens body ... which significantly enhance the easy insertibility of applicant's lens and significantly reduce any possibility of snagging delicate eye tissue." The examiner accepted Pannu's arguments, and allowed claim 16 subject to minor amendments to set forth precisely the structural details of the haptics. Claim 16 issued as claim 1 of U.S. Patent No. 4,435,855 ('855 patent) and reads as follows:

An intraocular lens comprising:

a lens body;

at least two spaced flexible positioning and supporting elements integrally formed with said lens body as a one piece construction and extending radially outward from the periphery of said lens body;

said elements defining a continuous, substantially circular arc having a diameter greater than the diameter of said lens body, said arc curved toward said lens circumference and terminating in a free end spaced from said periphery; and

snag resistant means integrally formed on the free end of said elements for smoothly guiding and positioning the lens across contacted eye tissue when implanting the lens,

said snag resistant means having an uninterrupted continuously smoothly curved outer periphery which merges with said free end and is substantially greater in size than the width of said flexible elements.

In 1985, Pannu filed an application for reissue of the '855 patent. The supplemental reissue oath stated that Pannu "unduly and without deceptive intent narrowed the claims beyond what was necessitated by the applied prior art by describing the shape of the outwardly extending elements as defining 'a continuous, substantially circular arc having a diameter greater than the diameter of the lens body.'" The examiner allowed Pannu to delete "defining a continuous, substantially circular arc having a diameter greater than the diameter of said lens body, said arc curved toward said lens circumference and terminating in a free end" from claim 1. However, the examiner required Pannu to insert additional limitations into the last section of the claim. The last section of claim 1 reads as follows with italics indicating additions and bracketing indicating deletions:

said snag resistant means having an uninterrupted, continuously smoothly curved outer periphery which merges with said free end and is [substantially] at least three times greater in [size] width than the width of said flexible elements, said snag resistant elements and said positioning and supporting elements being substantially coplanar. The '855 patent reissued as U.S. Patent No. Re 32,525 ('525 reissue).

Pannu filed suit against Storz, alleging that intraocular lenses sold by Storz infringed the '525 reissue. Storz filed a counterclaim seeking a declaratory judgment of patent invalidity, and moved for summary judgment that the '525 reissue improperly recaptures subject matter Pannu surrendered in obtaining allowance of claim 1 of the '855 patent. The court granted Storz's motion for summary judgment of invalidity and Pannu appeals.

Discussion

"We review a district court's grant of summary judgment de novo." *Vanmoor v. Wal-Mart Stores, Inc.*, 201 F.3d 1363, 1365, 53 USPQ2d 1377, 1378 (Fed. Cir. 2000). Determining whether the claims of a reissued patent violate 35 U.S.C. §251 is a question of law, which we review de novo. *In re Clement*, 131 F.3d 1464, 1468, 45 USPQ2d 1161, 1163 (Fed. Cir. 1997); *Mentor Corp. v. Coloplast, Inc.*, 998 F.2d 992, 995, 27 USPQ2d 1521, 1524 (Fed. Cir. 1993). This legal conclusion can involve underlying findings of fact, which are reviewed for substantial evidence. *Hester Indus., Inc. v. Stein, Inc.*, 142 F.3d 1472, 1479, 46 USPQ2d 1641, 1647 (Fed. Cir. 1998); *Mentor*, 998 F.2d at 994, 27 USPQ2d at 1524 (citing *Ball Corp. v. United States*, 729 F.2d 1429, 1439, 221 USPQ 289, 297 (Fed. Cir. 1984)). However, summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Vanmoor*, 201 F.3d at 1365, 53 USPQ2d at 1378.

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The underlying facts in this case are taken directly from the prosecution file histories and the claims of the '855 patent and the '525 reissue, and are not disputed. *See Hester*, 142 F.3d at 1484, 46 USPQ2d at 1651. Claim construction is a purely legal question, *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1456, 46 USPQ2d 1169, 1174 (Fed. Cir. 1998) (en banc), and therefore, comparison of the claims of the '855 patent and the '525 reissue is a purely legal question appropriate for summary judgment, *Westvaco Corp. v. Int'l Paper Co.*, 991 F.2d 735, 741, 26 USPQ2d 1353, 1358 (Fed. Cir. 1993) ("A determination of whether the scope of a reissue claim is identical with the scope of the original claim is a question of law, which we review de novo."):

The recapture rule "prevents a patentee from regaining through reissue the subject matter that he surrendered in an effort to obtain allowance of the original claims." *Clement*, 131 F.3d at 1468, 45 USPQ2d at 1164. Reissued claims that are broader than the original patent's claims in a manner directly pertinent to the subject matter surrendered during prosecution are impermissible. *Id.* (quoting *Mentor*, 998 F.2d at 996, 27 USPQ2d at 1525). Application of the recapture rule is a three-step process. The first step is to "determine whether and in what aspect the reissue claims are broader than the patent claims." *Id.* "The second step is to determine whether the broader aspects of the reissued claim related to surrendered subject matter." *Id.* Finally, the court must determine whether the reissued claims were materially narrowed in other respects to avoid the recapture rule. *Hester*, 142 F.3d at 1482-83, 46 USPQ2d at 1649-50; *Clement*, 131 F.3d at 1470, 45 USPQ2d at 1165.

[1] With respect to the shape of the haptics, claim 1 of the '525 reissue is broader than claim 1 of the original '855 patent. Claim 1 of the '855 patent limited the haptics to "a continuous, substantially circular arc having a diameter greater than the diameter of said lens body, said arc curved toward said lens circumference." Claim 1 of the '525 reissue eliminated this limitation on the shape of the haptics. "A reissue claim that does not include a limitation present in the original patent claims is broader in that respect." *Hester*, 142 F.3d at 1480, 46 USPQ2d at 1648. In addition, Pannu's reissue oath admitted that he unnecessarily narrowed the scope of the claim with respect to the shape of the haptics. He stated that "the [haptics] may actually be of any shape as long as the elements terminate in a free end having snag resistant means as now recited in claim 1." Correction of Pannu's unnecessary narrowing of claim 1 must involve a corresponding broadening of the reissued claim.

Pannu argues that even if the reissued claim is broader, it did not relate to subject matter surrendered during prosecution. This argument is without merit. As originally filed, none of the claims in the '953 application limited the shape of the haptics. The examiner rejected claims 1-14 as obvious. In response to the rejection, Pannu filed a supplemental amendment canceling claim 1 and adding new independent claim 16. Claim 16 described the haptics as "defining a continuous, substantially circular arc having a diameter greater than the diameter of said lens body, said arc curved toward said lens circumference." Pannu argued to the examiner, "no such particular shape is disclosed by the lenses of either Shearing or Lindstrom. In fact, Shearing teaches away from the concept of a continuous substantially circular arc supporting strand ... [and] the Lindstrom lens illustrates a supporting strand with a somewhat irregular, elliptical shape." The addition of the "continuous, substantially circular arc" limitation to claim 16 and the statements made by Pannu to the examiner during prosecution of the '855 patent limited the claim to exclude an interpretation that did not include a continuous, substantially circular arc. See *Southwall Techs., Inc. v. Cardinal AG Co.*, 54 F.3d 1570, 1576, 34 USPQ2d 1673, 1676 (1995). The shape of the haptics was broadened during reissue and was the same subject matter that was surrendered during prosecution.

Pannu argues, however, that because the reissued claims were materially narrowed in other respects, the '525 reissue avoids the recapture rule. See *Hesler*, 142 F.3d at 1482-83, 46 USPQ2d at 1649-50; *Clement*, 131 F.3d at 1470, 45 USPQ2d at 1165; *Mentor*, 998 F.2d at 996, 27 USPQ2d at 1525. Instead of being "substantially greater" than the width of the haptics, the snag resistant means must now be "at least three times greater" than the width of the haptics. In addition, the snag resistant means must now be "substantially coplanar" with the haptics. Pannu argues that both modifications relate to the configuration of the haptics, and therefore, what is gained by the elimination of one limitation is given up by the addition of the other limitations.

The "continuous, substantially circular arc" limitation related to the shape of the haptics. The narrowing aspect of the claim on

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reissue, however, was not related to the shape of the haptics, but rather the positioning and dimensions of the snag resistant means. Therefore, the reissued claims were not narrowed in any material respect compared with their broadening. Furthermore, "if the patentee is seeking to recover subject matter that had been surrendered during the initial prosecution this flexibility of analysis is eliminated, for the prosecution history establishes the substantiality of the change and estops its recapture." *Anderson v. Int'l Eng'g & Mfg., Inc.*, 160 F.3d 1345, 1349, 48 USPQ2d 1631, 1634 (Fed. Cir. 1998); see also *Mentor*, 998 F.2d at 996, 27 USPQ2d at 1525 ("[I]n this case, the reissue claims are broader than the original patent claims in a manner directly pertinent to the subject matter surrendered during prosecution. Mentor thus attempted to reclaim what it earlier gave up."). In prosecuting the '855 patent, Pannu specifically limited the shape of the haptics to a "continuous, substantially circular arc." On reissue, he is estopped from attempting to recapture the precise limitation he added to overcome prior art rejections.

Conclusion

Accordingly, we affirm the judgment of the United States District Court for the Southern District of Florida.

AFFIRMED

Footnotes

¹ The eye is considered to have two chambers separated by the iris. The anterior chamber lies between the back surface of the cornea and front surface of the iris. *Attorneys' Dictionary of Medicine and Word Finder A-280* (1995). The posterior chamber is the space between the back surface of the iris and the front surface of the crystalline lens. *Id.* at P-280.

- End of Case -

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